No. 90-539 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1990

CAROLYN SONNENBURG, ET AL., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether *Feres* v. *United States*, 340 U.S. 135 (1950), as well as the decisions that have relied on it, should be overruled.

2. Whether the deaths of petitioners' decedents arose out of or occurred in the course of activity incident to service under the *Feres* doctrine.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 11a-16a) is unreported. The opinion of the district court (Pet. App. 1a-8a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1990. On August 6, 1990, Justice O'Connor extended the time for filing a petition for a writ of certiorari until October 1, 1990. The petition was filed on September 27, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Between August and November 1981, the United States Marine Corps, Army, and Air Force assembled personnel at Nellis Air Force Base in Las Vegas, Nevada, for a joint exercise to test, *inter alia*, the effectiveness of penetrating enemy defenses with aircraft or helicopters. Both permanent Electronic Warfare Close Air Support (EWCAS) team members and temporary duty personnel were involved in the exercise. Pet. App. 1a-2a.

The temporary duty personnel involved in the exercise were brought from their home stations, posts, or bases to perform specific duties and were given official orders to accomplish those tasks. Those personnel were housed, fed, and clothed by the military services and were subject to military discipline. They were not permitted to bring their families with them, nor were they allowed to bring any means of private transportation. Pet. App. 2a-3a.

To achieve and maintain high morale among the permanent team members and the temporary duty personnel, the military services organized many recreational activities for the servicemen, on and off the base. Those activities included a picnic, a softball game, and a trip to Hoover Dam. The servicemen were taken to the activities in military buses driven by temporary duty personnel. Pet. App. 3a.

In October 1981, the military services organized a trip to Disneyland as part of this recreational program. The trip was announced while the servicemen were in formation, and the sign-up sheet for the trip was placed in the orderly room of the compound. The military provided free transportation to and from Disneyland in a military bus and in a van leased by EWCAS. Only military personnel went on the trip. Pet. App. 3a-4a, 5a.

On the morning of October 31, 1981, the EWCAS personnel traveled to Disneyland and, upon arriving, got into

formation. Once in formation, a head count would have been taken and any appropriate orders issued, under standard operating procedure. At the end of the day, there was another formation. Pet. App. 4a. A senior non-commanding officer asked one of the temporary duty personnel, Sergeant Barnett, to drive the van back to the base. Sergeant Barnett agreed to do so and invited several of his friends—all of whom were also temporary duty personnel—to join him. Before the bus and the van arrived back at the base, the van went off the road and crashed. Four of the temporary duty personnel in the van were killed. Pet. App. 5a.

2. Survivors of three servicemembers who were killed filed this wrongful death action against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2401, 2671 *et seq.* The United States District Court for the Central District of California dismissed the action on jurisdictional grounds. The district court concluded that plaintiffs' claims were barred under *Feres* v. *United States*, 340 U.S. 135 (1950). Pet. App. 8a. The court reasoned that because the servicemen who were killed had access to recreational benefits, including the Disneyland trip, only because of their status as military personnel, their injuries were incident to military service. Pet. App. 7a. The court also found it significant that the Disneyland trip was sponsored by the military. *Ibid.*

On appeal, the Ninth Circuit also concluded that the Disneyland trip was incident to military service, and affirmed in an unpublished, unsigned opinion. Pet. App. 11a-16a. The court of appeals arrived at this result by applying the test it developed in *Roush* v. *United States*, 752 F.2d 1460 (9th Cir. 1985), for determining whether a recreational activity is incident to military service within the meaning of *Feres*. Under that test, *Feres* will apply in a recreational context if the plaintiff (1) enjoys the recrea-

tional benefit solely by virtue of his military status, and (2) was subject to military control during the recreation. *Id.* at 1464-1465.

Applying this test, the court of appeals concluded that the Disneyland trip was a benefit accruing to the decedents solely because of their military status, and that "the district court could reasonably conclude that a de facto policy restricted the trip to service members." Pet. App. 13a. The court of appeals also concluded that "the decedents were under direct military control during their trip to Disneyland." Pet. App. 14a. In support of this holding, the court noted that the trip was organized to enhance the morale of the temporary duty employees, the temporary duty personnel were more closely monitored during the trip than even the permanent team members, the trip participants were required to assemble in formation on arriving at Disneyland and before their departure, and several high-ranking non-commissioned officers were present on the trip. Pet. App. 15a. The court also noted that the EWCAS administrative command organized the trip (Pet. App. 12a), and found that the driver of the van was subject to military regulations, including special military safe-driving requirements. Pet. App. 14a.

ARGUMENT

The decision of the court of appeals is faithful to this Court's decisions applying the *Feres* doctrine and does not conflict with the decisions of any other court of appeals. Further review is therefore unwarranted.

1. Petitioners do not seriously contend that this action could go forward consistently with the *Feres* doctrine. Instead, their principal contention is that this Court should grant certiorari to overrule *Feres* and hold that service-members may bring suit under the FTCA for injuries that

arise out of or in the course of activity incident to service. This Court expressly reaffirmed the validity of the *Feres* doctrine less than four years ago in *United States* v. *Johnson*, 481 U.S. 681 (1987). Since that time, nothing has occurred to require yet another look at the doctrine. Therefore, considerations of *stare decisis*, as well as the rationales underlying *Feres* and its progeny, strongly support the continuing validity of the *Feres* doctrine.

"[A]ny departure from the doctrine of *stare decisis* demands special justification." *Patterson* v. *McLean Credit Union*, 109 S. Ct. 2363, 2370 (1989) (quoting *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984)). Moreover, "the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction." *Patterson*, 109 S. Ct. at 2370. "Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Ibid.* (citing *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986); *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 736 (1977)).[1] Consequently, petitioners bear a heavy burden in arguing that *Feres* should be overruled. Petitioners cannot carry that burden because none of the "special justifications" recognized in *Patterson* is available here.

First, the arguments about whether *Feres* was decided correctly in light of the FTCA's language and history "were examined and discussed with great care" (*Patterson*,

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[1] See also *United States* v. *South Buffalo Ry.*, 333 U.S. 771, 774-775 (1948) ("[W]hen the questions are of statutory construction, not of constitutional import, Congress can rectify our mistake, if such it was, or change its policy at any time, and in these circumstances reversal is not readily to be made.").

109 S. Ct. at 2370) in *United States* v. *Johnson*, 481 U.S. 681 (1987). Four dissenting Justices in *Johnson* argued that *Feres* should be limited, essentially because in their view it was wrongly decided in the first place. 481 U.S. at 692. The majority, however, found that argument "unconvincing." *Id.* at 689 n.9. The majority noted that Congress has not acted to modify or set aside the *Feres* bar to suits "in the close to 40 years since it was articulated, even though, as the Court noted in *Feres*, Congress 'possesses a ready remedy' to alter a misinterpretation of its intent." 481 U.S. at 686. The majority explained (*ibid.*) that the Court "has never deviated" from holding that servicemembers may not sue the United States for injuries "that arise out of or are in the course of activity incident to service" (*Feres*, 340 U.S. at 146), and the Court "decline[d] to modify the doctrine at this late date." *Johnson*, 481 U.S. at 688.

For the Court to reconsider *Feres* now based on the same arguments as those rejected less than four years ago in *Johnson* would disserve the goal of maintaining a stable judicial system. The Court "is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion.' " *Patterson*, 109 S. Ct. at 2370 (quoting The Federalist No. 78, at 471 (A. Hamilton) (C. Rossiter ed. 1961)). To reconsider *Feres* now would create uncertainty among those who rely on the Court's cases to guide their conduct. Only confusion and instability occur when a "well established" precedent such as *Feres* (see *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 670 (1977)) is overruled.

Second, the *Feres* doctrine has not proved to be "unworkable" or "inconsistent with the sense of justice or with the social welfare." *Patterson*, 109 S. Ct. at 2371. To the contrary, *Feres*'s "incident to service" test has provided a

simple rule of decision that the government and the lower courts have been able to apply with relative ease. See, *e.g.*, *United States* v. *Stanley*, 483 U.S. 669, 683 (1987) (adopting "incident to service" test for determining *Bivens* liability in servicemember suits against federal officials because, among other reasons, the test "provides a line that is relatively clear"). For example, in the 40 years since *Feres* was decided, only a handful of *Feres* cases have made their way to the Court. Only three cases concerned application of the test,[2] and even those cases represent essentially the kind of fine-tuning any legal doctrine requires from time to time.[3]

Finally, *Feres* is not incompatible with the law as it has developed in other areas. Cf. *Patterson*, 109 S. Ct. at 2371. Indeed, *Feres* has been woven into the fabric of the law in a number of respects. For example, the Court has

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[2] See *United States* v. *Johnson*, 481 U.S. 681 (1987) (*Feres* bars FTCA claim by servicemember's estate for injuries caused by civilian employees of the government); *United States* v. *Shearer*, 473 U.S. 52 (1985) (*Feres* bars FTCA action brought by estate of serviceman who was murdered by another serviceman while off duty and off the military base); *United States* v. *Brown*, 348 U.S. 110 (1954) (*Feres* does not bar FTCA claims by discharged servicemen for post-discharge injuries).

[3] Aside from the three cases cited in note 2, *supra*, this Court's remaining *Feres* cases concerned whether the "incident to service" test should be used to bar non-FTCA actions against the United States. See *United States* v. *Stanley*, 483 U.S. 669 (1987) (*Feres* extended to bar *Bivens* claims by servicemen); *Chappell* v. *Wallace*, 462 U.S. 296 (1983) (same); *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666 (1977) (*Feres* bars indemnification action against United States for damages paid by third party to serviceman injured in course of military service); *United States* v. *Muniz*, 374 U.S. 150 (1963) (*Feres* not extended to bar FTCA suits by federal prisoners for injuries in federal prison resulting from negligence of government employees).

adopted the *Feres* test to determine the circumstances under which servicemembers may sue a federal official for violations of constitutional rights. *Stanley*, 483 U.S. at 684. *Feres* also has been held to bar indemnification actions against the United States for damages paid by third parties to servicemen who are injured in the course of duty. See *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666 (1977). And lower federal courts have adopted the "incident to service" rule in holding that no tort claim lies against the United States for the death or injury of a foreign serviceman arising out of service-related activities. See *Daberkow* v. *United States*, 581 F.2d 785 (9th Cir. 1978). To overrule *Feres* now would be to undermine settled precedents in a number of related areas of the law.

2. The policies underlying *Feres* remain valid. To begin, allowing service members to sue the military for service-connected injuries could have a severe impact on military discipline, morale, and control. Soldiers are trained to obey their superiors, not sue them. Suits by soldiers raising issues of military discipline would disrupt the " 'peculiar and special relationship of the soldier to his superiors' that might result if the solder were allowed to hale his superiors into court." *Chappell* v. *Wallace*, 462 U.S. 296, 304 (1983) (quoting *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 676 (1977) (Marshall, J., dissenting)). The military is a special society, and the relationship between the government and members of its armed forces is "distinctively federal in character." *Johnson*, 481 U.S. at 689 (quoting *Feres*, 340 U.S. at 143, and *United States* v. *Standard Oil Co.*, 332 U.S. 301, 305 (1947)). As the Court explained in an early case:

> An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be

> left open as to the right to command in the officer, or the duty of obedience in the soldier. Vigor and efficiency on the part of the officer and confidence among the soldiers in one another, are impaired if any question be left open as to their attitude to each other.

In re Grimley, 137 U.S. 147, 153 (1890); accord *Chappell* v. *Wallace*, 462 U.S. at 300 ("centuries of experience have developed a hierarchical structure of discipline and obedience to command, unique in its application to the military establishment and wholly different from civilian patterns.").[4]

Allowing servicemembers to bring FTCA suits for service-related injuries also would undermine the commitment to duty that the military services require. As this Court wrote in *Johnson*, "military discipline involves not only obedience to orders, but more generally duty and loyalty to one's service and to one's country. Suits brought by service members against the Government for service-related injuries could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word." 481 U.S. at 691.

The existence of "generous statutory disability and death benefits" for servicemembers and their families is an additional, and independent, reason supporting *Feres*. See *Johnson*, 481 U.S. at 689. Under the Veterans' Benefits Act, 38 U.S.C. 301 *et seq.* – a statute that has been amend-

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[4] Moreover, if *Feres* were overruled, the military would be confronted with "compelled depositions and trial testimony by military officers concerning the details of their military commands." See *United States* v. *Stanley*, 483 U.S. at 682-683. Requiring the military to respond to FTCA suits by servicemembers for injuries arising out of service-connected activities would drain military resources and would divert military personnel from their primary task of defending the nation.

ed a number of times since *Feres*—"[t]hose injured during the course of activity incident to service not only receive benefits that 'compare extremely favorably with those provided by most workmen's compensation statutes,' * * * but the recovery of benefits is 'swift [and] efficient,' * * * normally requir[ing] no litigation." *Johnson*, 481 U.S. at 690. It is "difficult to believe that Congress would have provided such a comprehensive system of benefits while at the same time contemplating recovery for service-related injuries under the FTCA." *Ibid.* In light of the generous no-fault compensation scheme Congress designed for injured servicemembers, it is difficult to attack the *Feres* doctrine as unfair.

Indeed, one commentator has observed that the Veterans' Benefits Act is "so broad that it more closely resembles a universal health and disability insurance policy than ordinary workmen's compensation." Bernott, *Fairness and* Feres*: A Critique of the Presumption of Injustice*, 44 Wash. & Lee L. Rev. 51, 63 (1987). This commentator explains:

> Unlike the compensation scheme for nonmilitary federal employees, the Federal Employees Compensation Act (FECA), the military scheme provides benefits for substantially *all* disabilities or injuries sustained or aggravated during a serviceman's federal service. There is no scope of employment test; thus no standard claimant's burden of proof of employment-connection; there is not even a typical adversary claims process. Barring his own willful misconduct that results in disability, the government compensates the serviceman for whatever physical adversity affects or befalls him so long as he is a member of the military.

Id. at 63-64 (footnotes omitted). Thus, to overrule or narrow *Feres* would merely broaden "the already fuller access

to federal compensation that servicemen enjoy over and above other federal employees." *Id.* at 65.

3. The court of appeals correctly applied the *Feres* doctrine to the facts of this case. Military personnel organized the trip at issue here to maintain high morale on the part of temporary duty employees during an intensive warfare training exercise, and the employees who went on the trip remained under military discipline and control during the entire trip. In holding that the *Feres* doctrine bars this action, the courts below simply followed the many other decisions that have consistently applied *Feres* to bar FTCA claims by servicemembers in analogous cases. See, *e.g.*, *Walls* v. *United States*, 832 F.2d 93 (7th Cir. 1987) (airplane crash during recreational flying); *Millang* v. *United States*, 817 F.2d 533 (9th Cir. 1987) (auto accident during picnic), cert. denied, 485 U.S. 987 (1988); *Bon* v. *United States*, 802 F.2d 1092 (9th Cir. 1986) (boat accident); *Woodside* v. *United States*, 606 F.2d 134 (6th Cir. 1979) (airplane crash during recreational flying), cert. denied, 445 U.S. 904 (1980); *Hass* v. *United States*, 518 F.2d 1138 (4th Cir. 1975) (riding horses at a stable owned and operated by the military); *Chambers* v. *United States*, 357 F.2d 224 (8th Cir. 1966) (swimming in pool at air base). In any event, further review would not be warranted to determine whether the court of appeals erred in applying settled legal doctrine to the facts of this case.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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